



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 71 OF 2011

SIMON MBUGUA NJUGUNA..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This Ruling is in respect of an application by Simon Mbugua Njuguna filed on 13th November 2012. The applicant is on trial for the murder of one **Gilbert Nyaga Njue** who is said to have met his death in the hands of the accused with others not before court on the 7th day of May 2009 at **Kiwanjani Village, Kasarani Division** within **Nairobi County**.

The applicant was arrested on 1st September 2011 and has been in custody since. On 27th October 2011 he applied to be released on bail pending trial. The application was heard and determined by Ombija J. who declined to grant the accused bail.

In his detailed ruling dated 13th June 2012, the learned Judge stated that it was abundantly clear that the likelihood of the accused person intimidating the witnesses was very real and that it was evident that the applicant was a flight risk.

The present application basically seeks a review of the earlier ruling. The applicant avers that he is not a flight risk and that he will not interfere with the prosecution witnesses most of whom have already testified. He avers at paragraph 7 of his supporting affidavit that he had not run away after the incident but had relocated to his ancestral home in Thika 'where no one looked for me or came for me'. He also deposes that he is suffering from hypertension, high blood pressure and diabetes.

When the application came up for hearing on 13th June 2013, **Ms. Odembo** for the applicant submitted on 3 main issues. Firstly, she submitted that the applicant had not gone into hiding but had relocated after being threatened by his sister. Secondly, on the issue of witnesses, she submitted that he would not interfere with them since the majority had already testified and further that upon release, the applicant would go and reside in his ancestral home in Thika away from the usual place of residence of the prosecution witnesses.

Thirdly, on the applicant's medical status, Counsel submitted that he was suffering from hypertension, high blood pressure and diabetes and required a lot of medical care including a restrictive diet which was not available at the prison.

The application is opposed by the State through the Replying Affidavit of the Investigating Officer one **No. 72536 Cpl. Daniel Muita** sworn on 28th January, 2013 and submissions made in court by learned

State Counsel **Konga**. The Investigating Officer deposes at paragraph 5 of his affidavit that the applicant went underground after committing the offence and was only arrested on 31st August 2011, two years down the line. He further deposes that there has been no change of circumstances since the previous application was rejected.

In oral submissions, **Mr. Konga** urged the court not to allow the application. He maintained that the applicant was a flight risk and that the suggestion that he had relocated to his ancestral home after being threatened by his sister was baseless as no reported threats had been made to the police.

On the issue of interference with witnesses, **Mr. Konga** submitted that the prosecution witnesses were nephews to the accused while the 3rd was his sister-in-law and therefore there was real likelihood of interference owing to familial proximity. He urged the court to find that interference with witnesses was a compelling reason not to admit the applicant to bail.

I have considered the application. **Article 49 (i) (h) of the Constitution** gives an arrested person a right to bail unless there are compelling reasons. In the present application, I have considered the averments in the rival affidavits as well as the Ruling by **Ombija J.** As stated earlier, **Ombija J.** had found that the applicant was likely to interfere with witnesses and that he was likely to take flight. I have therefore carefully reconsidered these two reasons.

From the record and rival affidavits it is not disputed that the incident took place on 7th May 2009 and that the applicant was arrested on 1st September 2011 and subsequently charged on 14th September 2011. I am not persuaded that the applicant was all the while unaware that he was a suspect in the case and that he merely relocated to his ancestral home in Thika. He must have been in hiding. The primary purpose of bail, as I understand it, is to secure an accused's attendance at trial. I find in the circumstances of this case that the applicant has demonstrated by his past conduct that he is not to be trusted to attend trial.

On the issue of interference with witnesses, it was submitted on behalf of the applicant that most of the witnesses have already testified. From my perusal of the record however, I find that only two prosecution witnesses have so far testified. Further, it is not disputed by the applicant that the witnesses were his close relatives. I find in the submissions of the prosecution that the State has discharged its burden in demonstrating the likelihood of interference. I hold, as I have done before, that interference with witnesses is a threat to the administration of justice and therefore a compelling reason to deny an applicant bail.

Finally, on the issue of the applicant's need for medical attention, I have perused the handwritten notes placed on the court file by defence counsel. I do not consider them an authoritative report on the medical status of the applicant. I have therefore disregarded them.

In conclusion, it is evident to me in this review application that there are no new issues or circumstances, to warrant a grant of bail. The application is rejected.

Ruling delivered, dated and signed at Nairobi this 27th day of August, 2013

R. LAGAT – KORIR

JUDGE

In the presence of:

Mosinko : Court clerk

Simon Mbugua Njuguna: Applicant

Ms. Odembo : For the accused/applicant

Mr. Konga : For the state/respondent